Supreme Court, U.S.
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No. 93-1986

In The

Supreme Court of the United States

October Term, 1994

MURPHY EXPLORATION AND PRODUCTION COMPANY,

Petitioner,

versus

WILLIE EARL DAVIS,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED FOR REVIEW

1. Did the Fifth Circuit correctly apply the Jones Act appellate standard of review to this jury's finding regarding the cause of Respondent's rare disease where the verdict was supported by reliable and valid scientific evidence admitted without objection?

2. Did the lower courts properly deny Petitioner's claim for set-off where Petitioner failed to timely plead set-off and where Petitioner's fringe benefits plans did not provide for a set-off of fringe benefits against a Jones Act award?

3. Did the trial judge commit a clear abuse of discretion in finding that the prejudicial effect of evidence of Petitioner's payment of fringe benefits to Respondent outweighed its probative value given the unique circumstances presented by this case?

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STATEMENT OF THE CASE

The Petition fails to accurately portray the record in this case. Respondent will therefore briefly summarize the pertinent record facts concerning the reviewability of the three questions presented.

The record contains evidence of Respondent's extensive and repeated exposure to the mist of volatile hydrocarbon solvents while spray painting aboard Petitioner's drilling vessels. (e.g., Tr. 83, 130 and 193). After considering this exposure history, Respondent's treating nephrologist, Dr. R. Garth Kirkwood, testified "that it is more probable than not that Mr. Davis' hydrocarbon exposure played a contributory causal role in his development of Goodpasture's Syndrome."[1] (Tr. 499-500). No questions concerning the admissibility of this testimony have been presented to this Court.[2]

The body of literature favoring a causal relationship relied upon by Respondent's experts includes case reports, animal studies and numerous epidemiological studies revealing a statistically significant incidence of substantial antecedent hydrocarbon exposure among

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[1] Goodpasture's Syndrome refers to anti-glomerular basement membrane glomerulonephritis when accompanied by symptoms of pulmonary hemorrhage.

[2] Petitioner only objected that Dr. Kirkwood's testimony was not expressed to a reasonable degree of medical certainty. (Tr. 499-500). The trial court responded that the proper standard of proof was medical probability rather than reasonable medical certainty and overruled the objection. *See Mayhew v. Bell*, 917 F.2d 838 (6th Cir. 1990). The trial court's ruling to admit the evidence was not appealed to the Fifth Circuit.

glomerulonephritis patients. The opinion Dr. Kirkwood rendered at trial merely echoed the published consensus of scientists considering this same body of evidence.[3]

With respect to Petitioner's claim of set-off, Petitioner's insistence that it only paid fringe benefits due to representations on claim forms indicating that the disease was not work-related is completely contrary to the record facts. The record shows that Petitioner made the decision to classify the illness as nonoccupational prior to the receipt of any claim forms from Respondent or his physicians. (R. 1785 and 1786). Furthermore, Petitioner continued to pay fringe benefits after Respondent's Jones Act claim was filed and even after the physicians executed affidavits indicating that the claim forms did not accurately express their opinion about whether Respondent's disease was related to his work. (R. 1240 and 1278 at Ex. 8, pp. 25-28 and Ex. 9, pp. 3-6).

The trial court's decision not to deduct the fringe benefits received by Respondent from the Jones Act award did not solely rest on the application of the collateral source rule. The rulings of the lower courts were also based on the failure of Petitioner to raise an affirmative defense of set-off and the failure of Petitioner to timely present its counterclaim for return of the benefits. (R. 1707-1726).

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[3] *See, e.g.* Bombassei GJ , Kaplan AA, (1992): *The Association Between Hydrocarbon Exposure and Anti-Glomerular Basement Membrane Antibody-Mediated Disease (Goodpasture's Syndrome)* Am J Ind Med 21:141-153; Daniell WE, Couser WG, Rosenstock L (1988): *Occupational Solvent Exposure and Glomerulonephritis. A Case Report and Review of the Literature.* JAMA 259(15):2280-2283.

Finally, a key aspect of the record omitted by Petitioner's statement of the case concerns the peculiar structure of Petitioner's fringe benefits plans. The plans contain work-related exclusions, however, absent from the plans are corresponding provisions to require set-off or reimbursement in the event of a Jones Act award. (R. 1278). Petitioner's plans do not link the determination to pay benefits under the plans with a subsequent determination of a causation issue in a Jones Act trial.

REASONS FOR DENYING THE WRIT

1. THE FIFTH CIRCUIT APPLIED THE CORRECT APPELLATE STANDARD OF REVIEW; WHETHER THE STANDARD WAS CORRECTLY APPLIED TO THE UNIQUE FACTS OF THIS CASE IS NOT WORTHY OF REVIEW BY THIS COURT.

Petitioner confuses the issue of whether "the Fifth Circuit applied the wrong standard" with the distinct question of whether that standard was properly applied to the unique and rare facts presented by this record. (Petition, p.6).

To the extent that Petitioner contends that the complete absence of probative evidence standard employed by the Fifth Circuit is not proper[4], Petitioner presents no authority or even argument supporting its position. No

[4] This Court has approved of the standard because "trial by jury is part of the remedy" provided by the Federal Employers' Liability Act (FELA) and the Jones Act. *Atlantic and Gulf Stevedores, Inc. v. Ellerman Lines*, 369 U.S. 355, 360 (1962).

courts are in conflict on the issue. The complete absence of probative fact standard for cases brought under FELA and the Jones Act has been repeatedly announced by this Court and has been uniformly applied in the circuits. *E.g., Ferguson v. Moore-McCormack Lines*, 352 U.S. 521, 523 (1957); *Dennis v. Denver and R.G.W.R. Co.*, 375 U.S. 208, 210 (1963); *Wilkerson v. McCarthy*, 336 U.S. 53, 57 (1949); *Lavender v. Kurn*, 327 U.S. 645 (1946); *see also Comeaux v. T. L. James & Co.*, 702 F.2d 1023, 1025 (5th Cir. 1983) (on rehearing); *Johnson v. Bryant*, 671 F.2d 1276, 1279 (11th Cir. 1982); *Joyce v. Atlantic Richfield Co.*, 651 F.2d 676, 682 (10th Cir. 1981); *Fleming v. American Export Isbrandtsen Lines*, 451 F.2d 1329, 1331 (2nd Cir. 1971).

Similarly, Petitioner's suggestion that the "feather-weight" standard of proof applies to issues of negligence but not of causation is a misstatement of existing jurisprudence. There is no controversy to the proposition that recovery is warranted where the shipowner's neglect has played any role – even the slightest – in producing a seaman's injury. *Rogers v. Missouri Pacific Railroad Company*, 352 U.S. 500, 506 (1957).

Stripped of the erroneous suggestion that the Fifth Circuit erred in discerning the appropriate legal standard of review, then, Petitioner simply contends that given the facts of this unique case, there was indeed a complete absence of probative evidence. Petitioner's contention that the jury and the courts below wrongly grasped the record facts is merely a purported failure of fact-finding unworthy of review by this Court. *See, e.g., United States v. Johnson*, 268 U.S. 220, 227 (1925).

By lifting a few words and phrases from the Fifth Circuit's opinion out of their proper context, the Petition inaccurately brands the opinion as sanctioning recovery based on speculation. The record shows, however, that scientists publishing their conclusions have written that the relationship is more likely to be causal than coincidental. (E.g., Tr. 500-504). After citing this evidence, the Fifth Circuit declared the evidence of causation to be "probative" and "sufficient to support the jury verdict." (A-18; A-43). Although the Fifth Circuit's discussion of the association between hydrocarbons and Goodpasture's Syndrome carries a more skeptical tone than most of the peer reviewed scientific writings, the Fifth Circuit did not say that the evidence on which the verdict was based was unreliable, irrelevant, invalid, inadmissable, merely speculative or unreasonable. This Court should not use the record of this case containing valid and reliable evidence of causation to issue an advisory opinion that records of lesser sorts will not support verdicts in favor of Jones Act claimants.

In *Daubert v. Merrill-Dow Pharmaceuticals, Inc.*, ___ U.S. ___, 113 S.Ct. 2786 (1993), the underlying scientific controversy was the association of Bendectin and limb reduction birth defects. Although the federal courts have been inundated by Bendectin cases, this Court's review of the matter only addressed the means of appropriately resolving such controversies in accordance with federal procedural and evidentiary[5] rules. This Court properly

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[5] FRE Rules 701-707 provide potent protection for defendants facing spurious scientific claims. Petitioner never raised any objections to the validity or reliability of Dr. Kirkwood's

restrained from deciding the underlying scientific dispute. Given the nature of this Court's review in *Daubert*, this Court should now decline Petitioner's invitation to jump into the midst of an exceedingly obscure scientific controversy about Goodpasture's Syndrome and hydrocarbon exposure and choose sides. It is not the proper task of this Court to present a catalogue of which propositions in science are valid and which are not.

In summary, Petitioners do not raise any controversial or important issues of federal substantive or procedural law. Petitioners simply want a change in the result of this particular case. The essence of the dispute between the parties is whether Respondent's hydrocarbon exposure did in fact play some role in his development of Goodpasture's Syndrome. It is not the proper function of this Court to change the jury's determination of that factual issue.

2. PETITIONER'S UNTIMELY PRESENTED CLAIM FOR SET-OFF IN THE ABSENCE OF A PLAN PROVISION ALLOWING FOR SET-OFF IS BASED ON AN ERRONEOUS FACTUAL PREMISE AND IS NOT A MATTER OF LEGAL OR PRACTICAL IMPORTANCE BEYOND THE CONCERNS OF THE PRESENT PARTIES.

The Petition raises no disagreement with the Fifth Circuit's discussion of the general application of the collateral source rule. Petitioner does not dispute that the rule can properly be applied to the Jones Act or FELA

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testimony, and thus, Petitioner's suggestion that the Fifth Circuit's decision conflicts with *Daubert* is baseless.

context where the employer-defendant and the payor of benefits is the same entity. Moreover, Petitioner does not quarrel with nor seek review of the lower courts' determination that Petitioner's plans were fringe benefit plans and therefore a collateral source rather than plans formulated in anticipation of potential legal liability. Petitioner's complaint is merely that the application of the collateral source rule to the unique facts of this case led to an unfair result.[6] This may be a matter of interest to Petitioner and Respondent but is of little other importance.

The courts below did not suggest that payments from health or disability plans are always subject to the collateral source rule. Courts are to determine whether plan payments are to be classified as collateral fringe benefits by examining the many factors outlined in *Phillips v. Western Company of North America*, 953 F.2d 923, 932 (5th Cir. 1992). Since the courts have listed the kinds of plan provisions which will lead to the application of the collateral source rule, it is a simple matter for an employer to draft a plan to avoid the rule's consequences.[7] The

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[6] Respondent will not belabor the fairness issue except to state that there is nothing unfair about an employer paying twice where the employer assumes legal obligations in addition to its Jones Act duties under benefits plans which are provided in lieu of additional compensation.

[7] The plans at issue are governed by the Employees' Retirement Income Security Act of 1974 (ERISA). ERISA grants broad discretion to entities writing welfare plans to determine what they will and will not cover. ERISA "does not regulate the substantive content of welfare-benefits plans." *Metropolitan Life Insurance Co. v. Massachusetts*, 471 U.S. 724, 732 (1985).

insertion of a set-off provision, for example, would not only tend to prevent a finding that a plan provides fringe benefits, but would also defeat a "double recovery" when enforced. *See, e.g., Provident Life & Accident Insurance Co. v. Waller*, 906 F.2d 985 (4th Cir. 1990) (enforcing a plan provision requiring reimbursement of benefits from tort recovery.). Given the peculiar nature of Petitioner's plans which omit standard reimbursement provisions, there is no importance to this issue.[8]

Even if the question of the application of the collateral source rule to plans with work-related exclusions but missing set-off provisions was in need of Supreme Court amplification, the nature of the record and decisions below precludes review in this case. Petitioner urges that this Court create an exception to the application of the collateral source rule because Petitioner was unfairly induced to pay fringe benefits due to statements on claim forms indicating that the illness was not work-related. The record facts, however, show that the claim forms were wholly irrelevant to Petitioner's decision to pay benefits. The record establishes that Petitioner made the strategic decision to classify the condition as nonoccupational prior to receiving any input about the cause of the disease from Respondent or his physicians (R. 1785-1786). This classification was never changed despite the production of affidavits from Respondent's physicians stating that the claim forms did not constitute the physicians'

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[8] Plan provisions allowing reimbursement from tort recovery are featured in model welfare-benefits plans. *See, e.g.*, Canan and Mitchell, *Employee Fringe and Welfare Benefits Plans*, 531 (1994).

opinions on causation. (R. 1240 and 1278 at Ex. 8, pp. 25-28 and Ex. 9, pp. 3-6). Thus, this Court cannot reach the question presented without first overturning the trial court's determination that Petitioner never relied on any representations by Respondent or his physicians. (R. 1707-1726).

Furthermore, this Court cannot reach the question presented because the lower courts announced an independent basis for denying set-off. The trial court held that Petitioner was not entitled to a set-off because it was not pleaded as an affirmative defense. (R. 1707-1726). The trial court's decision not to allow the jury award to be reduced by the receipt of fringe benefits is also supported by the trial court's denial of Petitioner's motion for leave to file counterclaim seeking recovery of the payments on grounds of untimely presentation.[9] (R. 1707-1726). These rulings were undisturbed by the Court of Appeal and the Question Presented does not raise these timeliness issues. (A-37-38). Since this Court's consideration of the Question Presented cannot affect the outcome of the case, this Court should not review the moot issue raised by the Petition.

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[9] Review in this matter is also not warranted in light of Petitioner's other continuing efforts to avoid a "double recovery." On the eve of trial, Petitioner filed a suit for reimbursement based on fraud, misrepresentation and detrimental reliance against Respondent and two of his expert witnesses. (R. 1959). The suit against Respondent was removed to federal court and is presently on appeal to the Fifth Circuit. *Murphy Exploration & Production Company v. Davis*, No. 92-3294. The action is still pending in state court against the physicians.

3. THE QUESTION OF WHETHER THE TRIAL COURT CLEARLY ABUSED ITS DISCRETION IN FINDING THAT THE HIGHLY PREJUDICIAL CLAIM FORM EVIDENCE OUTWEIGHED ITS WEAK PROBATIVE VALUE IS NOT WORTHY OF THIS COURT'S REVIEW.

The third Question Presented asks this Court to dive into the specific facts of this case and to determine whether the prejudicial impact of the claim form evidence was so strongly outweighed by its probative value that the trial court's decision to exclude the evidence was a clear abuse of its discretion.

By its nature, FRE 403 involves a fact-intensive inquiry unique to every case. Despite FRE 403's grant of discretion to trial judges to balance factors favoring and opposing admissibility in the context of specific cases, Petitioner urges this Court to announce an inflexible rule of admissibility whenever a seaman accepts benefits from plans with a work-related exclusion. Employers would be able to exchange the payment of fringe benefits earned by an employee for potentially damaging evidence in the event the employee later seeks to assert rights under the Jones Act. A mandatory admissability rule would as a practical matter force workers to select remedies. Such a result has long been denounced by this Court. *See, e.g., Southwest Marine, Inc. v. Gizoni*, ___ U.S. ___, 112 S.Ct. 486 (1991); *Tipton v. Socony Mobil Oil Co., Inc.*, 375 U.S. 34 (1963); *Eichel v. New York Central Railroad Co.*, 375 U.S. 253 (1963) (holding that the receipt of longshore benefits is not admissible against or a bar to a subsequent Jones Act claim that a worker is a seaman rather than a longshoreman).

Moreover, the trial judge's decision to exclude the claim form evidence in this case was proper. The Petition argues at length that introduction of the claim forms was necessary to allow Petitioner to explain why it did not pay maintenance and cure and thus defend against the punitive damages claim. (Petition, pp. 19-20). Questions of maintenance and cure, however, have nothing to do with whether a disease was caused by the seaman's employment. *Calmar S.S. Corp. v. Taylor*, 303 U.S. 525, 527 (1938). Moreover, since no punitive damages were awarded to Respondent, Petitioners are urging that the Court address the issue purely in the hypothetical.

The claim forms were of little, if any, probative value for the purposes of impeaching Dr. Kirkwood. Although the Petition suggests that Dr. Kirkwood made an informed decision that the disease was not work-related and later arbitrarily changed his mind, the record shows otherwise. The claim forms[10] only bear stamps of Dr. Kirkwood's signature on the bottom halves of the two part claim forms. The information on the top sections of the forms is information provided by "subscriber or insured" which was transcribed by Dr. Kirkwood's staff from the original form prepared by the patient. (R. 1278 (Smith 7, 8 and 9)). It is obvious from the face of the

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[10] Only one form actually bears Dr. Kirkwood's handwritten signature. This form was uncovered from Petitioner's files late in the proceedings. (R. 1278 (Smith 3A)). The district court excluded this form as untimely presented, a ruling which was undisturbed by the Court of Appeal. (R. 1724-26; A-42). Furthermore, it was never established that Dr. Kirkwood had any knowledge of the patient's hydrocarbon exposure at the time this form was signed. (R. 1808).

forms that the top sections of the forms – only sections which contain the checkmarks indicating that the disease is not work-related – do not constitute statements which can properly be attributed to the physicians.

Finally, Petitioner never presented any request to give the jury a limiting instruction during the trial. Petitioner first advanced the merits of limiting the evidence to impeachment in its Suggestion for Rehearing *En Banc*. Before the trial court, however, Petitioner vigorously argued that the jury needed to know that Respondent recovered money from the plan, that is, that Respondent was seeking what Petitioner considers a "double recovery". (E.g., R. 1708). Under these circumstances it is not appropriate for this Court to consider whether the trial judge abused his discretion in excluding rather than limiting the claim form evidence.

CONCLUSION

Considering the foregoing, it is respectfully submitted that the Writ of Certiorari be denied.

Respectfully submitted,

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